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Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Diamond Hong, Inc.

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Serial No. 76530111

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Kenneth Cang Li of Lin & Li, LLC for Diamond Hong, Inc.

Sophia S. Kim, Trademark Examining Attorney, Law Office 106  
(Mary I. Sparrow, Managing Attorney).

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Before Hairston, Grendel and Rogers, Administrative  
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the mark depicted below for goods identified in the  
application as "distilled spirits made of rice, peas or

sorghum, herb liquors, port wine, rum, sake, fruit wine, red wine, white wine and cooking wine."<sup>1</sup>



Applicant states in the application that the transliteration of the Chinese characters is "Ban Bian Ji," which translates into English as "half chicken/rooster."

The Trademark Examining Attorney has issued a final refusal to register applicant's mark, on the ground that the mark, as applied to the goods identified in the application, so resembles the mark depicted below,



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<sup>1</sup> Serial No. 76530111, filed on July 15, 2003. The application is based on applicant's allegation of intent-to-use. Trademark Act 1(b), 15 U.S.C. §1051(b).

previously registered for goods identified in the registration as "wines,"<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed main appeal briefs, but applicant did not file a reply brief and did not request an oral hearing. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, *supra*.

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<sup>2</sup> Registration No. 2159050, issued May 19, 1998. Affidavits under Trademark Act Sections 8 and 15 accepted and acknowledged.

We find that certain of the goods identified in the application, i.e., "port wine," "fruit wine," "red wine," "white wine," and "cooking wine," are encompassed by and thus are legally identical to the "wines" identified in the cited registration.<sup>3</sup> Moreover, because there are no restrictions or limitations in applicant's or registrant's respective identifications of goods, we also find that these goods are or would be marketed in the same trade channels and to the same classes of purchasers. We reject applicant's argument that because its mark includes Chinese characters, its wines likely would be marketed to and purchased only by Asian-American purchasers. No such restriction is included in applicant's identification of goods, and nothing in registrant's identification of goods would preclude registrant from marketing its wines to Asian-American purchasers.

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<sup>3</sup> We also find that the other items listed in applicant's identification of goods, i.e., "distilled spirits made of rice, peas or sorghum," "herb liquors," "rum" and "sake," are similar and related to registrant's "wines." It often has been held that various alcoholic beverages are similar and related to each other, for purposes of the second *du Pont* factor. See, e.g., *In re Majestic Distilling Co.*, *supra*; and *In re Hennessy*, 226 USPQ 274 (TTAB 1985). However, given that applicant's various wine products are legally identical to the "wines" identified in the cited registration, this finding regarding applicant's other goods, and their relationship to registrant's goods, is unnecessary to our decision herein, and we need not discuss applicant's other products any further.

We also find that applicant's and registrant's respective wines are ordinary consumer goods, purchased by ordinary consumers without a great deal of care. Although some wines can be expensive and purchased only by knowledgeable, sophisticated purchasers, the respective identifications of goods also encompass wines which are inexpensive and purchased by ordinary, non-sophisticated purchasers.

For the reasons discussed above, we conclude that the second, third and fourth *du Pont* evidentiary factors weigh in favor of a finding of likelihood of confusion.

We also find that the sixth *du Pont* factor, i.e., the number and nature of similar marks in use on similar goods, weighs in favor of a finding of likelihood of confusion. There is no evidence of any third-party registrations or third-party use of marks featuring roosters for wine, much less any marks featuring two mirror-image roosters facing each other in profile.

We turn now to the first *du Pont* factor, i.e., whether applicant's mark and registrant's mark are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles.

The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, in cases such as this, where the applicant's goods are identical to the registrant's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applying these principles in this case, we find, first, that the dominant feature of applicant's mark is the design of two mirror image roosters facing each other in profile. The Chinese characters in the middle of the mark contribute relatively less to the commercial impression of applicant's mark, because they would be indecipherable to the vast majority of purchasers in this country, who do not read or speak Chinese. To these purchasers, the Chinese characters would be viewed as merely a design element which may lend the mark an exotic or foreign feel. But because these purchasers cannot read the characters or understand what they mean, it is the two-rooster design which dominates the commercial impression of applicant's mark. The general principle cited by applicant, i.e., that when a mark consists of both wording and a design, the wording will tend to dominate the mark, is not applicable to this case, where the "wording" consists of Chinese characters that the vast majority of purchasers would not be able to read or understand.

Even to purchasers who read Chinese and who therefore would understand the letters to mean "half chicken/rooster," these words merely refer back to and reinforce the design of the mirror image roosters facing each other in profile. Applicant argues that the wording

"half chicken/rooster" would lead purchasers to view each of the two roosters in the design as half of a rooster, which when put together comprise a whole rooster. We are not persuaded by this argument. In any event, registrant's mark could be viewed in the same way, as half-roosters making up a whole rooster.

In short, while we do not ignore the Chinese characters in our analysis of applicant's mark and in our comparison of that mark to registrant's mark, we find, for the reasons stated above, that applicant's mark is dominated by the design of the mirror image roosters facing each other in profile. *See In re National Data Corp., supra.*

Next, we note that registrant's and applicant's respective marks are not identical, but that is not dispositive. As noted above, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but whether they are sufficiently similar, when viewed in their entirety, that consumers are likely to be confused as to the source of the goods sold under the marks. The points of dissimilarity between the marks, i.e., the fact that applicant's two roosters are depicted in solid silhouette while registrant's roosters are depicted in line drawings, and the addition to applicant's



mark of the Chinese characters, are greatly outweighed by the basic and overwhelming point of similarity between the marks, i.e., the fact that both marks prominently feature the unusual and highly distinctive design of two mirror image roosters facing each other in profile. Registrant's two-rooster design, in the absence of any evidence in the record to the contrary, must be considered an arbitrary and therefore highly distinctive mark for wines. Applicant's mark prominently features the same motif.

Purchasers are unlikely to assume, based simply on the slight difference in the rooster designs (solid silhouette versus line drawing) and the presence of the Chinese characters in applicant's mark, that there is no source or other connection between identical goods sold under the respective marks. It is more likely that purchasers will assume that there is a source or other connection between the goods sold under the respective marks, based on the presence in both marks of the design of two mirror image roosters facing each other in profile and despite the slight differences between the marks which might be perceived when the marks are compared side-by-side.

In terms of appearance, we find the marks to be similar rather than dissimilar, because both marks prominently feature the unusual design of two mirror image

roosters facing each other in profile. In terms of sound, we find the marks to be similar rather than dissimilar. The two marks are basically design marks which would have no pronunciation at all, because the vast majority of purchasers in this country who encounter applicant's mark would not pronounce the Chinese characters. In terms of connotation, we find the marks to be similar rather than dissimilar. To the vast majority of purchasers in this country, both marks connote what their designs depict, i.e., two roosters. Even if, as applicant contends, Chinese-speaking purchasers would understand the mark to mean two "half-roosters" making up one whole rooster, they could attribute the same meaning to registrant's mark.

For all of the reasons discussed above, we find that the marks create very similar commercial impressions when viewed in their entirety. Applicant argues that the respective marks are not only dissimilar, but that they are so dissimilar that the first *du Pont* factor outweighs all of the other factors. We cannot agree. The case cited by applicant in support of this argument, *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), simply is inapposite to the facts of the present case. Rather, as noted above, because applicant's goods are

identical to registrant's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were different. See *Century 21 Real Estate Corp. v. Century Life of America, supra*. We find that applicant's mark and registrant's mark certainly are similar enough to create confusion when used on identical goods.

In summary, after considering all of the relevant *du Pont* factors, we find that a likelihood of confusion exists.

Decision: The refusal to register is affirmed.